United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

Date: August 25, 1997

Case No. 96 INA 080

In the Matter of:

FARM CAFE,
Employer

on behalf of

JOSE ANTONIO LOPEZ,
Alien

Appearance: T. J. O'Leary, Esq., Washington, D. C.

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of JOSE ANTONIO LOPEZ (Alien) by FARM CAFE (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, the applicants requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the criteria of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On March 6, 1996, the Employer, which operates a restaurant in Woodbridge, Virginia, applied for labor certification on behalf of the Alien for the position of Cook. Employer offered $10.77 an hour with overtime at one and one-half times that hourly rate for this position, which required thirty-five hours a week. Although Employer stated no educational requirement, it required two years experience in the job offered. AF 19. The Alien worked from August 1989 to June 10, 1994, at a delicatessen in Baltimore, after which he was hired by the Employer and was working on this job at the time of application. AF 22-23.

Notice of Findings. On August 1, 1995, the Notice of Findings (NOF) by the Certifying Officer (CO) denied certification, subject to Employer's rebuttal. AF 10.

Based on a review of the menu submitted with the application for certification, the CO said that DOT had changed the position description from Cook, 313.361-014, with an SVP of 7, providing for two to four years of experience formerly required with this DOT specification to Cook, Specialty, 313.361.026, with an SVP of 5, providing for six months to one year of experience. The CO explained that Employer's menu indicated this business is primarily a sandwich shop with a few specialty platters. The CO stated that preparation of the food items on the menu did not correspond with the job duties of a Cook (hotel and restaurant) 313.361-014. For this reason the CO concluded that the two year experience requirement was unduly restrictive since it was twice the one year maximum associated with the revised DOT classification. AF 10-12.

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

1. Based on the results of this reclassification the CO found that its experience and training requirement for the job was unduly restrictive. The CO then required the Employer to rebut this finding with evidence that the requirement arises from its business necessity. AF 11.

2. The CO found that Employer had failed to provide lawful, job-related reasons for rejecting Mr. Teran and Ms. Waldron, U. S. workers who had applied for the position. As the Employer's reason for rejecting them was that they lacked two years of experience as a cook, an unduly restrictive requirement, the Employer was told that it must rebut the NOF with proof that U. S. workers are not able, willing, qualified, or available for the position being offered to the Alien by the Employer. AF 12.

Rebuttal. Employer submitted its rebuttal on September 5, 1995. AF 06-09. The rebuttal evidence included a copy of the menu, a copy of the business license and a letter from employer's attorney. Employer's attorney asserted that the NOF was wrong in concluding that the business was a sandwich shop, which required a less skilled cook. The letter listed menu items and argued that the position did require the performance of the duties listed in the DOT definition of Cook (hotel and restaurant), 313.361-014.

Final Determination. The CO denied certification in the Final Determination (FD) on September 15, 1995. AF 03-05. The CO found that the rebuttal evidence was insufficient to establish that this position required two years of experience by reason of the limited number of Asian dishes on the menu. Also, the CO stated, other DOT job descriptions require cooking some of the items listed on the menu, including short-order cook positions, which have an experience requirement of one to three months. For these reasons the menu items did not support the two year experience requirement for this job opportunity. Lastly, the CO said, evidence that another employee makes sandwiches does not demonstrate that the position at issue requires two years of experience in view of the limited and unchanging character of the remainder of items on the menu.

Appeal. Employer filed a request for review on September 25, 1995. AF 01-02. Employer contended that the CO erred in reclassifying this job opportunity. Employer argued that the employee will prepare all the items listed in the job description for Cook, Specialty and that the duties of the position are not the same as those listed in the description of Cook. AF 01.

DISCUSSION

In the NOF, the CO stated the job requirements matched those of Cook, 313.361-026, rather than Cook, hotel and restaurant,

313.361-014. One of the measures by which a job requirement is tested to determine whether it is unduly restrictive is inclusion of the requirement in the definition of the job in the Dictionary of Occupational Titles (DOT). The DOT states a variety of food preparation positions. Chefs and cooks working in the more expensive establishments require greater training and experience, while fast food specialty cooks require less training and experience, according to the DOT guidelines.

Although Employer's establishment is a sit-down restaurant, its menu indicates that it offers moderately priced meals, that are primarily of a short-order nature. Employer argues that the employee in this position will be required to perform all the of the job duties listed in the job description for Cook, hotel and restaurant, including "prepares and seasons soups, meats, vegetables, desserts, measures and mixes ingredients according to recipes, bakes, roasts, broils, and steams meats, and vegetables."

Although the menu does list various items that fit this description, there is no evidence that the position actually requires the performance of the duties listed in the definition of Cook, hotel and restaurant, 313.361-014. The menu includes three dessert items, for instance, but there is no evidence of record as to whether these are purchased from a bakery for resale in Employer's restaurant, whether they are prepared from box mixes requiring only the addition of such minor ingredients as water or are prepared from scratch by following a recipe and measuring ingredients.

We also agree with the CO that the menu indicates a limited number of simple items are prepared and presented to the public at moderate prices. These items normally are prepared by a cook with less experience and less training than those prepared by a chef or cook at a more expensive restaurant, where a greater number of more complex menu items is offered.

Moreover, the Employer's rebuttal consisted only of the additional copy of its menu and its attorney's statement that the job did require performance of duties set forth in the job description with the higher experience level. This Board has held, however, that the assertions of an employer's attorney do not constitute evidence unless they are supported by the statements of a person with knowledge of the facts. **Moda Linea, Inc.**, 90 INA 424 (Dec.11, 1991). The record contains no underlying evidence to support the attorney's assertion that this job opportunity requires the more complex cooking detailed in the job description for Cook, hotel and restaurant, 313.361-014, however. Accordingly, we find that the CO's DOT classification of this position as Cook, 313.361-026, was appropriate under all of the evidence of record.

It follows that the Employer's requirement of two years' experience is unduly restrictive, since the DOT job description for the position of Cook, specialty, requires only six months to one year of experience. In addition, the Employer's rejection of the two U. S. workers because they lacked two years' experience was for reasons that were neither lawful nor job related. Lastly, the CO properly denied certification for the further reason that the Employer imposed job requirements that were unduly restrictive in that they did not arise from its business necessity.

Consequently, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

Sheila Smith, Legal Technician

BALCA VOTE SHEET

Case No. 96 INA 080

FARM CAFE, Employer
JOSE ANTONIO LOPEZ, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: August 14, 1997